82142-9

NO. 36211-2- II

SUPREME COURT OF THE STATE OF WASHINGTON

NANCY NGYUEN WAPLES

Petitioner,

vs.

PETER H. YEE, et. al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
The Honorable FREDERICK W. FLEMING, Judge
Cause No. 06-2-11015-9

MOTION FOR DISCRETIONARY REVIEW TO THE SUPREME COURT

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ORIGINAL

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A. IDENTITY OF PETITIONER

The petitioner is Nancy Ngyuen Waples, who was the appellant in the Court of Appeals.

B. CITATION TO COURT OF APPEALS DECISION

The petitioner seeks review of the decision in the Court of Appeals, Division II, titled Waples v. Dr. Peter Yee, et. al., No. 36211-2- II, entered on June 3, 2008, which affirmed the dismissal of the case. The Respondents motioned to have the opinion published, which was granted on August 5, 2008.

C. ISSUE PRESENTED FOR REVIEW

Whether there is a significant question of constitutional law, the Court of Appeals decision was contrary to well settled case law, and/or substantial public interest of the decision, affirming the dismissal of the case.

D. STATEMENT OF THE CASE

The facts of this case are not in any serious dispute. The Appellant filed a compliant for damages against her former dentist for negligence regarding a dental procedure, on September 5, 2007. (CP Pages 1 through 3). The Plaintiff's counsel failed to request mediation before filing the complaint or obtain a certificate of merit. (CP Pages 8 through 14, 15 through 16, and 20 through 25). The mediation procedures were not in effect, when the case was filed. (CP Pages 20 through 25).

The trial court granted summary judgment and dismissed the case.

(CP Pages 36 and 37).

E. ARGUMENT

THERE IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW, THE COURT OF APPEALS DECISION WAS CONTRARY TO WELL SETTLED CASE LAW, AND/OR SUBSTANTIAL PUBLIC INTEREST OF THE DECISION, AFFIRMING THE CONVICTION.

RAP 13.4(b) allows review:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

It is Ms. Waples position that his case does meet the criteria stated. There were two problematic issues in this case, the first being the court's interpretation of RCW 7.70.100 in the same manner as RCW 4.96.010, even though the language of the statutes is different and the fact that 7.70.150 transfers the keys to the courtroom from the courts to private parties.

1. Strict compliance standard should not required, when RCW 7.70.100 does not apply to a governmental agency and is not worded the same as RCW 4.96.010. If this were a claim against the State of Washington or a local government, the rule requiring advance notice would be one of strict

compliance. See RCW 4.96.010 which uses the phrase ". . . *shall* be a condition precedent. . . ." (Emphasis added) in requiring that a demand be made against the governmental unit before a suit can be commenced. See also Burnett v. Tacoma City Light, 124 Wn. App. 550, 104 P.3d 677 (2004), where the court imposed a strict compliance standard. The court recognized that while this could lead to harsh results, the statute would still strictly apply, even if the act of filing the notice would be futile or if the governmental entity was aware of the claim. It is important to the analysis of the case that the statute in question dealt with governmental claims under RCW 4.96.010.

Unlike RCW 4.96.010, RCW 7.70.100 does not apply to governmental agencies and is worded differently. RCW 7.70.100 says no action may be filed with out the requisite notice. The statute also requires mediation, under rules to be promulgated by the Supreme Court. Those rules were created but did not take effect until March 11, 2007, after this case was dismissed.

In applying this to the case at bar, the statutes are worded differently. Further, RCW 4.96.010 deals with governmental units, that the legislature was not required to give up sovereign immunity in the first place. Given that statute uses language of ". . . shall be condition precedent . . ." to the filing of a lawsuit against a governmental entity, it is crystal clear that the terms are mandatory. Clearly, strict compliance was required, and the courts have so

held. In this case, because the statutes are worded differently and the statute deals with private tortfeasers, the trial court should have allowed the parties to engage in mediation, rather than dismiss the case.

2. The court should decline to enforce RCW 7.70.100 in this case, when it was filed prior to there even being any mediation procedures in effect, under the statute. Additionally, as stated above, the mediation requirements of RCW 7.70.100 were impossible to fulfill, because the rules to govern that mediation had not been created, at the time this lawsuit was filed. Given the recent enactment of the statute, and the fact that it was impossible for litigants to comply with the statute when this case was filed, the trial court should have allowed the parties to submit to mediation once it became available.

3. RCW 7.70.100 is unconstitutional when it treats one class of private tortfeasers differently than other classes of private tortfeasers for no justifiable reason. The courts may only find a statute unconstitutional when it is shown beyond a reasonable doubt. State v. Pietrzak 100 Wn. App. 291, 997 P.3d 947 (2000). Additionally a statute is unconstitutional on its face, when there are no circumstances where it can be applied constitutionally. See City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004).

The courts have dealt with equal protection as it applies to tort cases. In Hunter v. North Mason High School, 85 Wn.2d 810, 539 P.2d 845 (1975), a minor was injured playing rugby during a school P.E. class. His father did

notify the school principal of the injury. He did not make a claim, within 120 days of the injury, as was required by then RCW 4.96.020. The trial court dismissed the case, for failure to file such a claim. The Court of Appeals reversed, due to his minor status. The Washington State Supreme Court, instead, chose to look at the issue from equal protection grounds. The Supreme Court held that ". . . Statutory classifications which substantially burden such rights as to some individuals but not others are permissible under the equal protection clause of the Fourteenth Amendment only if they are 'reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920)." Hunter v. North Mason Highschool, supra. The court was concerned that the effect of this statute was to deny people the ability to pursue a claim against governmental entities, such as school districts, where no such requirement existed for private tortfeasers. Generally, most people would not be aware of the time limit, until after it expired. The court found that the statute was unconstitutional because it violated equal protection, because there was no legitimate reason to treat governmental entities differently than private entities. See also Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989). While the Court, in that case, did not decide the issue of previous attempts of tort "reform" on equal protection grounds, it did discuss the issue

and expressed concern.

In applying this to the case at bar, it should be noted that, like in Hunter, supra, the State has chosen to treat different classes of tortfeasers differently. There is no compelling governmental interest in doing so. One could argue that theses types of cases are more complex and time consuming. However, many non-medical cases are also complex and time consuming. Many slip and fall cases are going to be complicated. Civil cases involving embezzlement are going to be complicated, sorting though the records and presenting it in a coherent manner to a jury. Product liability can be extremely complicated. While the practice of medicine is important, so is the practice of law, accounting, not to mention operating theme parks, transportation, etc. There is no legitimate justification to treat medical providers any differently than these other classes of potential tortfeasers. Unlike Hunter, supra, we are not distinguishing governmental tortfeasers from private tortfeasers. This law differentiates different classes of *private* tortfeasers. The actions of the Legislature, in this case, were unreasonable and arbitrary. There simply is no justification. Accordingly, the court should find the statute unconstitutional. There is no set of circumstances whereby this statute could be constitutionally applied.

4. RCW 7.70.150 is unconstitutional when it treats one class of private tortfeasers differently than other classes of private tortfeasers for no justifiable reason. As stated above, the legislature cannot treat one class of

tortfeasers differently than another. See Hunter v. North Mason High School, 85 Wn.2d 810, 539 P.2d 845 (1975). For the same reasons RCW 7.70.100 treats medical practitioners differently, so does RCW 7.70.150. RCW 7.70.150 requires a certificate of merit, to even get into or stay in the courtroom. There would be no judicial review, by judge or jury, if such a certificate could not be had, because a case could not be filed or maintained. Any other type of private tortfeaser would be subject to the filing of a lawsuit, without a certificate of merit being obtained. As argued above, there simply are no justifications to treat medical malpractice any different. The actions of the Legislature, were unreasonable and arbitrary, when it passed RCW 7.70.150, just as it was when it passed RCW 7.70.100.

Prior to the enactment of these statutes, there were remedies to the filing of frivolous suits. Litigation is not pleasant and can be expensive, regardless of the type of tort claim that is being litigated. This author would suggest that the only justification was an attempt on the part of the Legislature to placate the medical profession and insurance industry. That does not justify the discrimination RCW 7.70.150 codifies into our legal system. Equal protection is not the only constitutional problem of RCW 7.70.150.

5. RCW 7.70.150 is unconstitutional when it removes the discretion of the court to rule on whether a case has merit and by removing the right to trial by jury, by requiring an expert to determine merit, as a condition

precedent to the case going forward. The Appellant submits that this statute is unconstitutional on its face. ". . . Our Washington state constitution does not contain a formal separation-of-powers clause. Nonetheless, separation of powers is a vital doctrine, presumed throughout our state history from the division of our state government into three separate branches." State v. David, 134 Wn. App. 470, 141 P.3d 646 (2006). Additionally, the right to a jury trial in tort cases is guaranteed by the Washington State Constitution.

Washington State Constitution
Article 1 section 21

> The right of a trial by jury shall remain inviolate, but the legislature may provide for a jury for any number less than twelve in courts not of record, and for a verdict of nine of more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

The courts have made clear that this applies to tort claims. In Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989), the Washington Supreme Court dealt with another legislative attempt to limit the discretion of juries, in tort claims. There, the legislature placed a cap on non-economic damages, at $300,000.00. The jury was not to be told about the cap; the judge would reduce the judgment downward. The Court did an analysis of the cases that dealt with the extent of the right to a civil jury trial. The starting point was the extent of the right at the time the Constitution was adopted. State ex. rel. Goodner v. Speed, 96 Wn.2d 838, 640 P.2d 13 (1982). The court cited Baker v. Prewitt, 3 Wash. Terr. 595, 19 P. 149 (1888) to

make clear that the scope of the right to trial by jury included determining damages. The court made clear that determining the actual damages was the province of the jury and that the statutory scheme was therefore unconstitutional because it removed that from the jury. The court rejected comparisons to the judge's authority under the doctrine of remittitur.

The judge's authority under that doctrine was discussed in James v. Roebeck, 79 Wn.2d 864, 490 P.2d 878 (1971) where the court reviewed the trial judge's reduction of a damage award. While a trial judge has the right to change a jury's determination of damages, great deference has to be shown to the jury and there must be a finding that the jury's award was not supported by the evidence in the trial. Again, the Supreme Court established very clearly the important role of the jury in determining the damages. The court in Sofie, supra, pointed out that the tort reform legislation took the doctrine of remittitur a step further and referred to it as legislative remittitur. Unlike the trial court's discretion, the Legislature required the reduction, regardless of the evidence. The key difference was that the legislature's scheme had no bearing to the facts of the case at all, where as the traditional authority of the judge required that the evidence be taken into account.

In applying this to the case at bar, it RCW 7.70.150 actually goes further than the laws that was the subject of the Sofie, case. At least under the previous law, the case could be brought and be subject to judicial review of the verdict, where as in this case, without the certificate of merit one does not get to go into court at all. While it would, admittedly, be a rare case that is able to go forward without expert evidence, RCW 7.70.150 mandates it, for the case to even go forward. In essence, the Legislature granted private

citizens a veto power over a claim being pursued, with no judicial review. If there is a reluctance by qualified individuals to give such a certificate, regardless of the reason for that reluctance, there will be no judicial review of the merits, not to mention a jury, because RCW 7.70.150 requires dismissal. Such a statutory scheme violates the separation of powers doctrine, because the statute takes away the legitimate authority of the courts, to make the final ruling in legal disputes. It is the Appellant's position that requiring a non-judicial entity to essentially take over the role of deciding whether a claim has merit is nothing more than a legislative encroachment of the judicial branch of government. This is also true when there are already judicial remedies to quickly dispose of non-meritorious cases from the court system. As argued above, there is no set of circumstances whereby this statute could be constitutionally applied. See City of Redmond v. Moore, supra.

RCW 7.70.150 also violates Article I, section 21 of the Washington State Constitution because it takes the role of determining the facts of a case from the jury and gives it to the expert who prepares or does not prepare the certificate. This statute goes far beyond what was found to be unconstitutional in Sofie v. Fibreboard Corp., supra. For that reason, the trial court erred in dismissing the case.

For those reasons, the Court of Appeals erred in affirming its decision. Further, there is a significant issue of law under the Washington State Constitution for those same reasons. There is also a significant issue of public interest. This is not the first time that the legislature has attempted to limit the judiciary's discretion and authority in processing tort claims

through legislation. See Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989) already cited in this motion, where the court struck down such an attempt. It is the Petitioner's position that this statute goes well beyond the legislation addressed in Sophie, supra. Far from merely limiting the court's authority to award damages, this statute allows private entities the power to block litigation, altogether. For those same reasons, there is also a public issue that should be reviewed by this court.

C. CONCLUSION

Therefore, for the reasons given in this motion, the Supreme Court should accept review in this matter.

DATED THIS 2 Day of September, 2008.

RESPECTFULLY SUBMITTED

George A. Steele #13749
Attorney for Petitioner

APPENDIX

189 P.3d 813

Court of Appeals of Washington, Division 2.
Nancy N. WAPLES and Mark Waples, husband and wife and their marital community thereof, Appellants,
v.
Peter H. YI, DDS, and Jane Doe Yi, husband and wife and their marital community thereof, dba Lakewood Dental Clinic, and Dr. Peter H. Yi, DDS, P.S., a Washington corporation, Respondents.

No. 36211-2-II.

June 3, 2008.
Publication Ordered Aug. 5, 2008.

Background: Patient brought negligence action against dentist, alleging that dentist's employee injured her by negligently injecting anesthetic. The Superior Court, Pierce County, Frederick Fleming, J., dismissed action. Patient appealed.

Holdings: The Court of Appeals, Houghton, C.J., held that:
(1) statutory requirement that patient provide a 90-day written notice of intention to sue a health care provider for professional negligence was mandatory, and
(2) statute did not violate equal protection clause.

Affirmed.

West Headnotes

[1] KeyCite Citing References for this Headnote

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

30 Appeal and Error KeyCite Citing References for this Headnote
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k895 Scope of Inquiry
30k895(2) k. Effect of Findings Below. Most Cited Cases

Appellate court reviews a summary judgment order de novo, taking the evidence in the light most favorable to the nonmoving party.

[2] KeyCite Citing References for this Headnote

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Appellate court reviews issues pertaining to constitutional limitations and statutory authority de novo.

[3] KeyCite Citing References for this Headnote

30 Appeal and Error
30XVI Review

30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Appellate court reviews a statute's meaning de novo.

[4] KeyCite Citing References for this Headnote

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

In interpreting statute, a court must discern and implement the legislature's intent.

[5] KeyCite Citing References for this Headnote

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Court reviews the statute's plain language and, if unambiguous, it gives effect to that language as the expression of the legislature's intent.

[6] KeyCite Citing References for this Headnote

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk807 k. Notice. Most Cited Cases

Statutory requirement that patient provide a 90-day written notice of intention to sue a health care provider for professional negligence was mandatory. West's RCWA 7.70.100(2006).

[7] KeyCite Citing References for this Headnote

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In General. Most Cited Cases

92 Constitutional Law KeyCite Citing References for this Headnote
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1001 Doubt
92k1004 k. Proof Beyond a Reasonable Doubt. Most Cited Cases

92 Constitutional Law KeyCite Citing References for this Headnote
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1030 k. In General. Most Cited Cases

Court presumes the constitutionality of a statute, and a party who challenges a statute's constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt.

[8] KeyCite Citing References for this Headnote

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3041 k. Similarly Situated Persons; Like Circumstances. Most Cited Cases

To show a violation of the equal protection clause, a party must first establish that the challenged act treats unequally two similarly situated classes of people. U.S.C.A. Const.Amend. 14.

[9] KeyCite Citing References for this Headnote

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3039 k. In General. Most Cited Cases

Where persons of different classes are treated differently, there is no equal protection violation. U.S.C.A. Const.Amend. 14.

[10] KeyCite Citing References for this Headnote

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3043 k. Statutes and Other Written Regulations and Rules. Most Cited Cases

Only when a statute treats individuals of the same class differently may a claimant proceed with an equal protection claim. U.S.C.A. Const.Amend. 14.

[11] KeyCite Citing References for this Headnote

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)17 Tort or Financial Liabilities
92k3750 Personal Injuries
92k3754 k. Medical Malpractice. Most Cited Cases

198H Health KeyCite Citing References for this Headnote
198HV Malpractice, Negligence, or Breach of Duty
198HV(A) In General
198Hk601 Constitutional and Statutory Provisions
198Hk604 k. Validity. Most Cited Cases

Statute that required that patient provide a 90-day written notice of intention to sue a health care provider for professional negligence had no effect on the statute of limitations for medical negligence claimants compared with nonmedical negligence claimants, and thus, statute did not violate

equal protection; statute treated all medical negligence claimants the same, giving all such claimants the same window of time in which to pursue an action. U.S.C.A. Const.Amend. 14; West's RCWA 7.70.100(2006).

[12] KeyCite Citing References for this Headnote

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3053 k. In General. Most Cited Cases

Equal protection cases that do not involve a suspect classification or a fundamental right are reviewed under rational basis review, or minimal scrutiny. U.S.C.A. Const.Amend. 14.

[13] KeyCite Citing References for this Headnote

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and Other Written Regulations and Rules. Most Cited Cases

Under "rational basis review," a statutory classification violates equal protection only if no conceivable state of facts reasonably justifies the classification and the classification is purely arbitrary; courts look to see whether the policy behind the statutory classification rationally relates to a legitimate state purpose. U.S.C.A. Const.Amend. 14.

[14] KeyCite Citing References for this Headnote

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(A) In General
198Hk601 Constitutional and Statutory Provisions
198Hk604 k. Validity. Most Cited Cases

Statute that required that patient provide a 90-day written notice of intention to sue a health care provider for professional negligence was rationally related to a legitimate state purpose, and thus, it did not violate equal protection; statute was intended to provide incentives to settle medical malpractice cases before resorting to court. U.S.C.A. Const.Amend. 14; West's RCWA 7.70.100(2006).

[15] KeyCite Citing References for this Headnote

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k843 Matters Not Necessary to Decision on Review
30k843(1) k. In General. Most Cited Cases

Judicial restraint principles dictate that when resolution of an issue effectively disposes of a case, appellate court should not reach any other issues.

[16] KeyCite Citing References for this Headnote

92 Constitutional Law

92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k975 k. In General. Most Cited Cases

Appellate court only decides constitutional issues when necessary.

*814 George Alan Steele, Attorney at Law, Shelton, WA, for Appellants.

John Cornelius Versnel III, Vanessa Vanderbrug, Lawrence and Versnel PLLC, Seattle, WA, James Eric Carlson, Webb Tanner Powell Mertz & Wilson LLP, Lawrenceville, GA, for Respondents.

*815 Pamela M. Andrews, Johnson Andrews & Skinner, appearing pro se.

HOUGHTON, C.J.

¶ 1 Nancy Waples appeals the dismissal of her negligence claim against Dr. Peter H. Yi based on her noncompliance with the notice requirement of former RCW 7.70,100(1) (2006). We affirm.

FACTS

¶ 2 On September 16, 2003, Waples received dental treatment from Yi. On September 5, 2006, Waples filed a complaint against Yi seeking damages arising from her 2003 visit. Waples' complaint alleged that Yi's employee injured her by negligently injecting Novocain. On September 14, 2006, Waples served Yi with a copy of the summons and complaint.

¶ 3 In his answer, Yi raised an affirmative defense that Waples failed to comply with the notice requirement set forth in former RCW 7.70.100(1). On February 8, 2007, Yi moved for summary judgment and sought dismissal of Waples' claims for failure to comply with the statutory notice requirement. At a hearing on the motion, Waples did not dispute that she failed to comply with the statute and the trial court granted the motion. Waples appeals.

ANALYSIS

¶ 4 Waples presents several arguments on appeal. She contends the trial court erred in dismissing her claim because former RCW 7.70.100's notice requirement is not mandatory, and when she filed her complaint, the Supreme Court had not by rule adopted mediation procedures as required by the statute. She also argues that former RCW 7.70.100 violated the right to equal protection under article 1, section 12 of the Washington Constitution and that RCW 7.70.150 violates separation of powers and equal protection because it requires a certificate of merit before commencing a medical negligence claim.

[1] [2] ¶ 5 We review a summary judgment order de novo, taking the evidence in the light most favorable to the nonmoving party. Morinaga v, Vue, 85 Wash.App. 822, 828, 935 P.2d 637 (1997). We review issues pertaining to constitutional limitations and statutory authority de novo. Fusato v. Wash. Interscholastic Activities Ass'n, 93 Wash.App. 762, 767, 970 P.2d 774 (1999).

[3] [4] [5] ¶ 6 Additionally, we review a statute's meaning de novo. Wright v. Jeckle, 158 Wash.2d 375, 380, 144 P.3d 301 (2006).

We must discern and implement the legislature's intent. Wright, 158 Wash.2d at 379, 144 P.3d 301. We review the statute's plain language and, if unambiguous, we give effect to that language as the expression of the legislature's intent. McLane Co. v. Dep't of Revenue, 105 Wash.App. 409, 413, 19 P.3d 1119 (2001).

[6] ¶ 7 Waples first contends that former RCW 7.70.100(1) did not require strict compliance. In 2006, the legislature amended RCW 7.70.100, which governs the mandatory mediation of health care professional negligence claims. It added the requirement of a 90-day written notice of intention to sue a health care provider. Laws Of 2006, ch. 8, § 314.FN1 According to former RCW 7.70.100(1):

FN1. RCW 7.70.100 was again amended in 2007. LAWS OF 2007, ch. 119, § 1. For purposes of this opinion, we refer to the 2006 version. The 2007 amendment does not affect our analysis.

No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the service of the notice.

¶ 8 We discern no ambiguity in former RCW 7.70.100(1). By its plain language, former RCW 7.70.100(1) mandated that a plaintiff may only pursue an action based on a health care provider's negligence on the condition that the plaintiff provides at least 90 days' notice. No one disputes that Waples failed to do so. Her argument against the *816 mandatory nature of the notice requirement fails.

¶ 9 Waples next contends that "the mediation requirements of [former] RCW 7.70.100 were impossible to fulfill" because our Supreme Court had not, at the time she filed her complaint, adopted mediation procedures as contemplated under former RCW 7.70.100(4). As a result, she argues, the trial court "should have allowed the parties to submit to mediation once it became available." Appellant's Br. at 6. But regardless of whether our Supreme Court adopted rules governing mediation procedures at the time she filed her complaint, she admittedly failed to comply with the mandatory 90-day notice requirement. Therefore, her argument regarding mediation procedures is not relevant to the disposition of her case.

[7] ¶ 10 Waples further contends that former RCW 7.70.100 violated the equal protection clause of the Washington Constitution. The Fourteenth Amendment of the United States Constitution and the privileges and immunities clause of article I, section 12 of the Washington Constitution guarantee the right to equal protection of laws. Merseal v. Dep't of Licensing, 99 Wash.App. 414, 420, 994 P.2d 262 (2000). We presume the constitutionality of a statute, and a party who challenges a statute's " 'constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt.' " Habitat Watch v. Skagit County, 155 Wash.2d 397, 414, 120 P.3d 56 (2005) (quoting State v. Thorne, 129 Wash.2d 736, 769-70, 921 P.2d 514 (1996)).

[8] [9] [10] ¶ 11 "[T]o 'show a violation of

the equal protection clause, a party must first establish that the challenged act treats unequally two similarly situated classes of people:' " Fell v. Spokane Transit Auth., 128 Wash.2d 618, 635, 911 P.2d 1319 (1996) (quoting Cosro, Inc. v. Liquor Control Bd., 107 Wash.2d 754, 760, 733 P.2d 539 (1987)). But "[w]here persons of different classes are treated differently, there is no equal protection violation." Forbes v. City of Seattle, 113 Wash.2d 929, 943, 785 P.2d 431 (1990). Only when a statute treats individuals of the same class differently may a claimant proceed with an equal protection claim. Forbes, 113 Wash.2d at 943, 785 P.2d 431.

¶ 12 Waples relies on Hunter v. North Mason High School and School District No. 403, 85 Wash.2d 810, 818-19, 539 P.2d 845 (1975), a case in which our Supreme Court held that a statute violated equal protection because victims of governmental tortfeasors had to pursue a claim within four months of injury and victims of nongovernmental tortfeasors had no such burden. She argues that there "is no compelling governmental interest" for former RCW 7.70.100 to treat "different classes of tortfeasors differently." Appellant's Br. at 8, 7.

[11] ¶ 13 Unlike in Hunter, former RCW 7.70.100's notice requirement had no effect on the statute of limitations for medical negligence claimants compared with nonmedical negligence claimants. For example, when a claimant gives the required notice to the medical professional within 90 days of the expiration of the statute of limitations, that notice tolls the statute of limitations for 90 days from the date of giving notice.FN2 Former RCW 7.70.100(1). Thus, at least for purposes of the statute of limitations, former RCW 7.70.100 complied with Hunter by treating all medical negligence claimants the same, giving all such claimants the same window of time in which to pursue an action.

FN2. "If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the service of the notice." Former RCW 7.70.100(1).

[12] [13] ¶ 14 Even assuming former RCW 7.70.100's notice requirement acted as a burden on the rights of medical negligence claimants, Waples' equal protection argument fails. Because this case does not involve a suspect classification or a fundamental right, we review the statute under rational basis review, or minimal scrutiny. See Nielsen v. Wash. State Bar Ass'n, 90 Wash.2d 818, 820, 585 P.2d 1191 (1978). Under rational basis review, a statutory classification violates equal protection only if no conceivable state of facts reasonably justifies the classification and the classification is purely arbitrary. *817 Tunstall v. Bergeson, 141 Wash.2d 201, 226-27, 5 P.3d 691 (2000). We look to see whether the policy behind the statutory classification rationally relates to a legitimate state purpose. In the Pers. Restraint of Fogle, 128 Wash.2d 56, 62, 904 P.2d 722 (1995).

[14] ¶ 15 Former RCW 7.70.100 rationally furthered a legitimate state purpose. In passing RCW 7.70.100, the legislature intended "to provide incentives to settle [medical malpractice] cases before resorting to court." Laws of 2006, ch. 8, § 1; see also § 314. Seeking to provide an incentive to settle before filing a medical negligence claim provides a legitimate state purpose FN3 and limiting the notice requirement to medical

negligence claimants is not an arbitrary classification in furtherance of that legitimate goal. The classification helps to achieve the policy's aims of facilitating settlement between a claimant and a medical professional in such claims. Accordingly, former RCW 7.70.100 did not violate equal protection.

FN3. When enacting Second Substitute House Bill No. 2292, the medical malpractice act, the legislature found:[A]ccess to safe, affordable health care is. one of the most important issues facing the citizens of Washington state.... The rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. The answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all the participants.

Laws of 2006, ch. 8, § 1.

[15] [16] ¶ 16 Waples next argues that RCW 7.70.150 violates separation of powers and equal protection because it requires a claimant against a medical provider to file a certificate of merit at the time of filing the complaint. But her arguments regarding a required certificate of merit are not relevant to the trial court's reason for dismissing her lawsuit: her failure to comply with former RCW 7.70.100's notice requirement. Because judicial restraint principles dictate that when resolution of an issue effectively disposes of a case, we should not reach any other issues, and because we only decide constitutional issues when necessary, we do not further address Waples' additional unconstitutionality arguments. Wash. State Farm Bureau Fed'n v. Gregoire, 162 Wash.2d 284, 307, 174 P.3d 1142 (2007); Gersema v. Allstate Ins. Co., 127 Wash.App. 687, 697, 112 P.3d 552 (2005).

¶ 17 Affirmed.

We concur: ARMSTRONG and QUINN-BRINTNALL, JJ.

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Briefs and Other Related Documents (Back to top)

• 362112 (Docket) (Apr. 16, 2007)
END OF DOCUMENT

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NANCY N. WAPLES and MARK WAPLES, husband and wife and their marital community thereof, Appellants, v. PETER H. YI, DDS, and JANE DOE YI, husband and wife and their marital community thereof, dba LAKEWOOD DENTAL CLINIC, and Dr. Peter H. YI, DDS, P.S., a Washington corporation, Respondents.	No. 36211-2-II ORDER PUBLISHING OPINION

Respondent Peter H. Yi moves this court for publication of its unpublished opinion filed on June 3, 2008. The Court having reviewed the record, file, motion to publish, response to motion to publish filed by the Appellant, and the amicus joinder on motion to publish filed by Pamela Andrew here, now, therefore, it is hereby

ORDERED that the final paragraph which reads "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered." is deleted. It is further

ORDERED that the opinion will now be published.

DATED: this _____ day of _____, 2008.

PANEL: Jj. Houghton, Armstrong, Quinn-Brintnall.

FOR THE COURT:

_____

PRESIDING JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NANCY N. WAPLES and MARK WAPLES, husband and wife and their marital community thereof, Appellants, v. PETER H. YI, DDS, and JANE DOE YI, husband and wife and their marital community thereof, dba LAKEWOOD DENTAL CLINIC, and Dr. Peter H. YI, DDS, P.S., a Washington corporation, Respondents.	No. 36211-2-II UNPUBLISHED OPINION

Houghton, C. J. -- Nancy Waples appeals the dismissal of her negligence claim against Dr. Peter H. Yi based on her noncompliance with the notice requirement of former RCW 7.70.100(1) (2006). We affirm.

FACTS

On September 16, 2003, Waples received dental treatment from Yi. On September 5, 2006, Waples filed a complaint against Yi seeking damages arising from her 2003 visit. Waples' complaint alleged that Yi's employee injured her by negligently injecting Novocain. On September 14, 2006, Waples served Yi with a copy of the summons and complaint.

In his answer, Yi raised an affirmative defense that Waples failed to comply with the

notice requirement set forth in former RCW 7.70.100(1). On February 8, 2007, Yi moved for summary judgment and sought dismissal of Waples' claims for failure to comply with the statutory notice requirement. At a hearing on the motion, Waples did not dispute that she failed to comply with the statute and the trial court granted the motion. Waples appeals.

ANALYSIS

Waples presents several arguments on appeal. She contends the trial court erred in dismissing her claim because former RCW 7.70.100's notice requirement is not mandatory, and when she filed her complaint, the Supreme Court had not by rule adopted mediation procedures as required by the statute. She also argues that former RCW 7.70.100 violated the right to equal protection under article 1, section 12 of the Washington Constitution and that RCW 7.70.150 violates separation of powers and equal protection because it requires a certificate of merit before commencing a medical negligence claim.

We review a summary judgment order de novo, taking the evidence in the light most favorable to the nonmoving party. *Morinaga v. Vue*, 85 Wn. App. 822, 828, 935 P.2d 637 (1997). We review issues pertaining to constitutional limitations and statutory authority de novo. *Fusato v. Wash. Interscholastic Activities Ass'n*, 93 Wn. App. 762, 767, 970 P.2d 774 (1999).

Additionally, we review a statute's meaning de novo. *Wright v. Jeckle*, 158 Wn.2d 375, 380, 144 P.3d 301 (2006). We must discern and implement the legislature's intent. *Wright*, 158 Wn.2d at 379. We review the statute's plain language and, if unambiguous, we give effect to that language as the expression of the legislature's intent. *McLane Co. v. Dep't of Revenue*, 105 Wn. App. 409, 413, 19 P.3d 1119 (2001).

Waples first contends that former RCW 7.70.100(1) did not require strict compliance. In 2006, the legislature amended RCW 7.70.100, which governs the mandatory mediation of health care professional negligence claims. It added the requirement of a 90-day written notice of

intention to sue a health care provider. Laws of 2006, ch. 8, § 314.[1] According to former RCW 7.70.100(1):

> No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the service of the notice.

We discern no ambiguity in former RCW 7.70.100(1). By its plain language, former RCW 7.70.100(1) mandated that a plaintiff may only pursue an action based on a health care provider's negligence on the condition that the plaintiff provides at least 90 days' notice. No one disputes that Waples failed to do so. Her argument against the mandatory nature of the notice requirement fails.

Waples next contends that "the mediation requirements of [former] RCW 7.70.100 were impossible to fulfill" because our Supreme Court had not, at the time she filed her complaint, adopted mediation procedures as contemplated under former RCW 7.70.100(4). As a result, she argues, the trial court "should have allowed the parties to submit to mediation once it became available." Appellant's Br. at 6. But regardless of whether our Supreme Court adopted rules governing mediation procedures at the time she filed her complaint, she admittedly failed to

[1] RCW 7.70.100 was again amended in 2007. Laws of 2007, ch. 119, § 1. For purposes of this opinion, we refer to the 2006 version. The 2007 amendment does not affect our analysis.

comply with the mandatory 90-day notice requirement. Therefore, her argument regarding mediation procedures is not relevant to the disposition of her case.

Waples further contends that former RCW 7.70.100 violated the equal protection clause of the Washington Constitution. The Fourteenth Amendment of the United States Constitution and the privileges and immunities clause of article I, section 12 of the Washington Constitution guarantee the right to equal protection of laws. *Merseal v. Dep't of Licensing*, 99 Wn. App. 414, 420, 994 P.2d 262 (2000). We presume the constitutionality of a statute, and a party who challenges a statute's "'constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt.'" *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 414, 120 P.3d 56 (2005) (quoting *State v. Thorne*, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996)).

"[T]o 'show a violation of the equal protection clause, a party must first establish that the challenged act treats unequally two similarly situated classes of people.'" *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 635, 911 P.2d 1319 (1996) (quoting *Cosro, Inc. v. Liquor Control Bd.*, 107 Wn.2d 754, 760, 733 P.2d 539 (1987)). But "[w]here persons of different classes are treated differently, there is no equal protection violation." *Forbes v. City of Seattle*, 113 Wn.2d 929, 943, 785 P.2d 431 (1990). Only when a statute treats individuals of the same class differently may a claimant proceed with an equal protection claim. *Forbes*, 113 Wn.2d at 943.

Waples relies on *Hunter v. North Mason High School and School District No. 403*, 85 Wn.2d 810, 818-19, 539 P.2d 845 (1975), a case in which our Supreme Court held that a statute violated equal protection because victims of governmental tortfeasors had to pursue a claim within four months of injury and victims of nongovernmental tortfeasors had no such burden. She argues that there "is no compelling governmental interest" for former RCW 7.70.100 to treat "different classes of tortfeasors differently." Appellant's Br. at 8, 7.

Unlike in *Hunter*, former RCW 7.70.100's notice requirement had no effect on the statute

of limitations for medical negligence claimants compared with nonmedical negligence claimants. For example, when a claimant gives the required notice to the medical professional within 90 days of the expiration of the statute of limitations, that notice tolls the statute of limitations for 90 days from the date of giving notice.[2] Former RCW 7.70.100(1). Thus, at least for purposes of the statute of limitations, former RCW 7.70.100 complied with *Hunter* by treating all medical negligence claimants the same, giving all such claimants the same window of time in which to pursue an action.

Even assuming former RCW 7.70.100's notice requirement acted as a burden on the rights of medical negligence claimants, Waples' equal protection argument fails. Because this case does not involve a suspect classification or a fundamental right, we review the statute under rational basis review, or minimal scrutiny. *See Nielsen v. Wash. State Bar Ass'n*, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978). Under rational basis review, a statutory classification violates equal protection only if no conceivable state of facts reasonably justifies the classification and the classification is purely arbitrary. *Tunstall v. Bergeson*, 141 Wn.2d 201, 226-27, 5 P.3d 691 (2000). We look to see whether the policy behind the statutory classification rationally relates to a legitimate state purpose. *In the Pers. Restraint of Fogle*, 128 Wn.2d 56, 62, 904 P.2d 722 (1995).

Former RCW 7.70.100 rationally furthered a legitimate state purpose. In passing RCW 7.70.100, the legislature intended "to provide incentives to settle [medical malpractice] cases before resorting to court." Laws of 2006, ch. 8, § 1; *see also* § 314. Seeking to provide an incentive to settle before filing a medical negligence claim provides a legitimate state purpose[3] and

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[2] "If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the service of the notice." Former RCW 7.70.100(1).

[3] When enacting Second Substitute House Bill No. 2292, the medical malpractice act, the legislature found:

[A]ccess to safe, affordable health care is one of the most important issues facing

limiting the notice requirement to medical negligence claimants is not an arbitrary classification in furtherance of that legitimate goal. The classification helps to achieve the policy's aims of facilitating settlement between a claimant and a medical professional in such claims. Accordingly, former RCW 7.70.100 did not violate equal protection.

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Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

> the citizens of Washington state. . . . The rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. The answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all the participants.

Laws of 2006, ch. 8, § 1.

Houghton, C.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.